2001

Almon J. Flake v. : Reply Brief

Utah Supreme Court

Loren D. Martin; Martin and Nelson; Attorney for Appellant.
Matthew C. Barneck; Richards, Brandt, Miller and Nelson; Attorney for Respondent.

IN THE UTAH SUPREME COURT

450 S. State St., Salt Lake City, Utah 84114-0210

In the Matter of the Estate of ALMON J. FLAKE Deceased.	Case No. 20010478-SC PRIORITY 15

ANSWER TO ISSUES RAISED IN CROSS-APPEAL
and
REPLY TO APPELLEE'S RESPONSE TO ISSUES
RAISED IN APPELLANT'S OPENING BRIEF

Appeal from Order dated July 11, 2001, construing the provisions of the Utah Uniform Probate Code

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REPLY TO APPELLEE/CROSS-APPELLANTS' CHALLENGE
to
APPELLANT'S COMPLETE LIST OF ALL PARTIES TO THE PROCEEDING

Appellee has claimed that,

> Appellant's Brief incorrectly includes certain beneficiaries of the Trust as parties to the action. None of them were properly joined as parties by naming them as defendants or serving summonses according to Rule 4 of the Utah Rules of Civil Procedure.

It is noted in the Record that Almon Flake's oldest child, Vickie, refused to join with her siblings in this litigation. However, each of the "Contesting Children" personally and individually filed pleadings before the District Court "Pro se." By so doing each of the "Contesting Children" individually and personally joined themselves as parties to this action. Copies of each of the Pro se documents are attached hereto as part of the Addendum.

The names and addresses of the four Contesting Children are:

Joel Almon Flake
1913 West 500 North
Provo, Utah 84601

Lynette Flake Watts
984 North 500 East
Centerville, Utah 84014

Connie Flake Jackson
193 West 1250 North
Centerville, Utah 84014

Mark Widdison Flake
943 West 150 South
Kaysville, Utah 84037

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STATEMENT OF ISSUES AND STANDARD FOR REVIEW

Appellee has raised several issues in its capacity as Cross-Appellant. But there remain just two issues. Other questions raised by Appellee hinge entirely upon how this Court determines only two issues.

FIRST ISSUES — PHASE ONE OF THE TRIAL:

Did the trial court err in concluding that the 1998 trust "restatement" did not fully revoke the 1987 original trust? and

Was the trial court's conclusion on that issue solely one of interpretation of law or was that issue first resolved through Findings of Fact?

Appellee vigorously argues that the trial court determined this first issue only and solely as a question of law.

That is untrue. The trial court entered both Findings of Fact and Conclusions of Law on this first issue. The trial court's Finding of Fact was that the decedent would never have executed any document designed to leave his surviving spouse destitute. But that is how the Contesting Children interpreted and implemented the second documents. Consequently, the trial court held that as a Finding of Fact the two documents must be read together.

Standard for Review:

Findings of Fact will not be reversed on appeal unless they are clearly erroneous. **Young v. Young**, 979 P.2d 338 (Utah 1999).

SECOND ISSUE — PHASE ONE OF THE TRIAL:[1]

As to the second issue of Phase One the trial court held as a matter of law that the "Trust Administration" of decedent's estates was not governed by provisions of the Utah Uniform Probate Code.

In so doing trial court erred when it construed the requirements of § 75-3-912, of the Utah Uniform Probate Code to not be applicable to "Trust Administration" in decedent's estates? Being solely an interpretation of the intent and meaning of the Utah Uniform Probate Code enactment by the Utah Legislature.

Standard for Review:

Interpretation of a Legislative Enactment is a Conclusion of Law. **Savage Industries v. State**, 811 P.2d 664 (Utah 1991). Conclusions of law are given no particular deference on appeal but are reviewed for correctness. See also: **Carrier v. Pro-Tech**, 944 P.2d 346 (Utah 1997).

ADDITIONAL ISSUES RAISED IN APPELLEE/CROSS-APPELLANT'S BRIEF:

Although additional issues are now raised in Appellee/Cross-Appellant's Brief, all are dependent upon the trial court's resolution of the first two major issues listed above.

STATEMENT OF THE CASE

The trial court erroneously reasoned that the "Trust Administration" provisions of the Utah Uniform Probate Code had not originally been an integral part of the Utah Uniform Probate Code. Consequently, the trial judge reasoned that § 75-3-912,

[1] That Second Issue is listed in Appellee.s Brief as "Issue 3" on page tqo.

governing "Settlement Agreements," was not applicable to "Trust Administration" of decedent's estates under judicial supervision.

Therefore, the trial court judge found himself on the horns of a dilemma.

- As a Finding of Fact Almon Flake would never have signed the second trust intending it to be interpreted as leaving his surviving spouse destitute,
- But if the provisions of § 75-3-912 were not applicable to Trust Administration of decedent's estates the trial court must, as a matter of law, rule in the Contesting Children's favor, leaving Appellant destitute.

That was the trial court's dilemma. There is no question but that § 75-3-912 requires that every private settlement agreement related to decedent's estates must be set forth in a written "contract executed by all [persons] who are affected by its provisions."

But if § 75-3-912 did not apply to administration of decedent's trusts and there was an oral agreement as claimed by the Contesting Children the law required that the trial court rule in favor of the Contesting Children even if the surviving spouse were left destitute.

The Contesting Children adamantly claimed that in Centerville on the night of April 14, 1999, Marian agreed to all of their demands even though Marian has always denied any such claim. There was no testimony that Marian ever even verbally consented to the Contesting Children's demands either on April 14, 1999 or at any other time.

Marian has always forthrightly denied any such claim and refused to ever sign a subsequently drafted "Settlement Agreement" that had been prepared by the Contesting Children's legal counsel. If fact, the evidence was that nobody, not even one of the Contesting Children, ever signed that proposed "Settlement Agreement." That blank "Settlement Agreement" was admitted at trial as Defendant "Exhibit 40."

But the trial court believed the testimony of the Contesting Children that an oral settlement agreement had been reached.

Consequently, the trial court judge believed that he had no option under law but to rule in the Contesting Children's favor even though that oral "settlement agreement" left the surviving spouse destitute.

Unfortunately, the trial judge erroneously thought himself bound and required by law to rule in the Contesting Children's favor. That is why the parties are now before this Court on appeal. This matter is before the Supreme Court because it involves interpretation of the Utah Uniform Probate Code.

However, Appellee/Cross-Appellants' Brief has attempted to bring additional issues into dispute on appeal. But the Appellee/Cross-Appellants' Brief also identifies significant points of agreement.

Significant Points of Agreement:

On page four (4) of the Appellee/Cross-Appellants' Brief it states that:

> At the pretrial conference, the trial court ruled that the trial would be divided into several phases in order to address various issues separately, each of which could potentially resolve all claims in the case. [Emphasis added.]

On pages four (4) and five (5) of the Appellee/Cross-Appellants' Brief it is acknowledged that there were two issues before the trial court during "Phase One." With that the Appellant agrees.

There were two issues before the trial court during Phase One. Both of those issues are identified herein above within the Statement of Issues and Standard for Review. The parties are in agreement that those same two issues presented to the trial court during Phase One.

Two issues were presented to the trial court and ruled upon in Phase One:

Pages five (5) and seven (7) of the Appellee/Cross-Appellants' Brief specifically identifies the "two issues" of Phase One:

First Issue:

> "Phase One was to consider whether the parties reached an enforceable settlement agreement before the action was filed." (Appellees' Brief, page 5, para 2)

Second Issue:

> "[As part of Phase One] The trial court also held that the [1999 trust] Restatement did not fully supercede the 1987 Trust documents?" (Appellees' Brief, page 7, para 1)

Appellees' Position on Appeal:

Appellee/Cross-Appellants' Brief now puts forth the argument on appeal that the trial court ruled in its favor on both issues solely as a matter of law. That is not true.

On February 10, 2000 the trial court entered specific Findings of Fact as to the interrelationship between the 1987 and the 1999 trust documents.

Later, at the pre-trial conference the trial judge ordered that the trial be divided into distinct and successive Phases. The trial judge then specifically designated exactly what evidence would be accepted at each "Phase."

Phase One dealt solely with the interpretation of trust documents and whether or not the parties had entered into an oral binding agreement after Almon's death but before any formal legal action had ever been commenced. During the Phase One the trial court only permitted evidence relating to those two specific issues.

The reason given by the trial judge was one of judicial efficiency. Each Phase was so arranged that should the court rule against Marian on any one of the successive Phases the trial would end and judgment would be entered for the Respondents.

No written pre-trial order was issued. However, Respondents have acknowledged on page four (4) of their Brief that such was the order, sequence of Phases and nature of proceedings before the trial court.

Disposition Below:

The trial court had previously entered Findings of Fact that it had entered on the record on February 20, 2000 that the decedent, Almon J. Flake, would never have intended to execute documents that would leave Marian destitute and on church welfare. Having entered its Findings of Fact the court then determined that both the 1987 and the 1998 trust documents must be read together. Consequently, on the Record the trial judge entered both Findings of Fact and Conclusions of Law that the 1987 and the 1998 trust documents must be read together.

It is agreed by the parties that the trial court found as a matter of law that the 1987 and the 1998 trust documents must be read together.

Unfortunately, the trial judge also ruled that even though no agreement was ever signed by any party, the trial judge found that an oral binding agreement had been reached against Marian's interest, thereby ending the trial at Phase One.

Point of Agreement as to Conclusion of Trial at Phase One:

It is agreed by all parties as stated in Appellee/Cross-Appellants' Brief that,

> "Those rulings [of Phase One] disposed of all of Marian's claims and the trial court determined there was no need to proceed to another phase of trial." (Appellees' Brief, page 6, paragraph 3) [Emphasis added.]

Given the nature of the Appellees' Brief, two issues are raised on appeal:

1. Issue raised by Appellant — Did the trial court err in holding that an oral binding agreement had been reached between all parties and that under provisions of the Utah Uniform Probate Code that oral agreement is binding against Marian's interest?

2. Issue raised by Appellee — Did the trial court err in holding that the 1999 testamentary and trust documents did not fully revoke previous documents?

The Appellee/Cross-Appellants' Brief does mention other issues. However, all other issues except one may be included within the circumference of the above two.

That one exception is Appellee/Cross-Appellants' claim that the trial judge erred in "failing to award attorney fees and costs resulting from Marian's failure to remove lis pendens from trust property."

In that regard, it is suspected that Appellee was not aware of a most recent Order of the trial court that was entered after this appeal was taken. That most recent Order did not become a part of the Record Index as the trial court did not file that Order until December 19, 2001. That Order overturned a previous trial court Stay that was issued in Appellee/Cross-Appellants' favor. That most recent Order simply states that,

> Marian Flake's MOTION FOR RELIEF FROM ORDER GRANTING TRUSTEE'S [APPELLEE/CROSS-APPELLANTS'] STAY, Dated August 29, 2001 is hereby Granted. [Emphasis in original.]

A copy of that ORDER is in the Addendum herein.

STATEMENT OF FACTS

1. It is not mentioned in the Appellee/Cross-Appellants' Brief that February 20, 2000 the trial court received evidence and heard the testimony of witnesses.[2]

2. At the conclusion of the hearing on February 20, 2000 the trial judge specifically entered the following Findings: (See: Transcript of Hearing dated February 10, 2000, pages 48-52, copies of which are included in the Addendum enclosed herewith.) Neither of the parties requested written findings at that time. But the trial court's Findings were verbal and on the Record:

> THE COURT: The Court's going to make the following findings. And these cases that — and I've had several — are very difficult for families and the parties involved, you know. And I didn't have an opportunity to know Mr. Flake, but it appears from everything that I have read that he was a very caring, generous, good man, you know. And in that regard, probably (inaudible) [disappointed] to see what's transpired. Because I don't think he would be a very happy person if he came and saw what transpired. I don't

[2] Transcript of Hearing, February 10, 2000, Addendum.

think that would be his intent, in fact, in any of these documents to see what's happened over the last few days — or the last several months or almost a year. I think he would have resolved it somewhat differently having seen what has taken place and given the history of what I've seen and read about this man.

The legal issue that I have to deal with is what document is controlling. And while I haven't reached that determination, I think that there is a substantial question as to whether the first trust, the second trust, if there is a trust, and what document controls. There is [are] different languages, which we [he] initially provided.

Initially, he provided for the care — required the trust to care for the needs, including her living arrangements in the home or other reasonable living quarters.

[In] the second trust there was no mention that the trust shall care for the needs but it limited the payment of the second trust of how the home should be handled, and required that it be placed in a second trust, and that while it's in the second trust, that the trust shall pay for only certain costs and that other costs allowed the trustee to pay for such maintenance costs that the trustee should feel what is appropriate.

For purposes of temporary support, I'm trying to determine, then, what are her reasonable needs. And I think that's more than minimum needs. I think it's what are her reasonable needs. I think it should exclude things that are not reasonable because of how this may end.

So the Court is going to make the following determination: As to the medical expenses, that there's no question she has substantial medical needs, including issues with hearing aids, dental work, and medical. So I'm going to attribute $575 a month to her medical needs. And that includes certain testimony that I received in chambers as to her dental needs and bills that were presented to the Court as to what it's going to take to do her dental needs, plus her hearing aids.

> Insurance, the Court is going to attribute $156, $146 to Blue Cross, plus $10 co-pay. Her car, $200, at $70 insurance. I think there is gas and upkeep. And I think that at least she has had to make transportation for treatment, going to the hospital, and so it would necessitate regular use of the automobile.
>
> The phone, a reasonable use, the Court's going to attribute $100. For food, $300. Her home maintenance will be taken care of. The Court's going to reduce that from $500 to $75. Recreation, from $150 to $75. I don't think there was shown recreation in terms of $150. Clothes and personal items, I think she does have some personal needs. The Court's going to reduce that from 300 to $100.
>
> The miscellaneous, I think there are certain miscellaneous items, although during this time the trust is probably not responsible for gifts and those things, and the Court is going to reduce that to $100.
>
> Also, the Court is going to allow tithing as a reasonable expense, because I think when there are (inaudible) Mr. Flake through his life has paid that, I'm going to make that determination and is going to do that.
>
> Those items added together would be $1,772.30. If I take the $913, that leaves a balance of $859.30. The Court — I believe that there has been, because of the pendency and the time, that there has been some back (inaudible). So the Court is going to — feels that there are some expenses that have accrued, because she's had to charge items and hasn't had funds available. So the Court is going to order that the trust pay her living expenses, plus $1,000 on a temporary basis until there's a final resolution and interpretation of that agreement. [Emphasis added.]

3. Concluding that the law required that he rule against Marian as a matter of law at trial, the trial court still held that the Contesting Children must continue to pay Marian additional support in the amount of $350.45 per month. The trial court determined that that such amount was in accordance with what the trial court had

determined was within the meaning of what was intended by the unsigned "settlement agreement."[3]

4. Two different versions of that draft "settlement agreement" that had been prepared by the Contesting Children's attorney are included within the Addendum herein. The two versions were admitted in evidence at trial as Plaintiff "Exhibit 2", Defendant "Exhibit 38" and as Defendant "Exhibit 40." The first transmission of that proposed "settlement agreement" to Marian was by letter from the Contesting Children's attorney dated April 29, 1999. The first version included blank lines for both signatures and Notary. The second version, transmitted by letter from the Contesting Children's attorney dated October 1, 1999[4] had deleted the space for signature or Notary. Even the first letter from the Contesting Children's attorney dated April 29, 1999 (enclosed herein as part of the Addendum) stated that:

> I have enclosed a draft of the agreement made by the parties on April 14. Please review the agreement with your client [Marian] and then let me know if there are any clarifications or modifications that you feel would be appropriate. [Emphasis added.]

5. Some time subsequent to trial the Respondents obtained a Stay that they not be required to pay anything to Marian. However, on December 19, 2001 an Order of the trial court was entered that granted "Marian Flake's Motion for Relief from Order Granting Trustee's Stay, Dated August 29, 2001." A copy of that Order is included in the Addendum.

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[3] Findings of Fact and Conclusions of Law, July 11, 2001, page 20, subparagraph "d", Record at page 1161.

[4] Plaintiff's "Exhibit 2".

6. Yet, it is a fact that there is no evidence that Marian has received any funds from for her support from November 15, 1998 to the present except for the temporary support. Even though, arguably the estate of Almon J. Flake may have exceeded $800,000.00[5], Marian only received the temporary support for a period of eight (8) months, being from February 2000 to September 2000. Almon has been dead now for more than three years. In justification, the Contesting children have stated through the trustee, their brother, neither they, the estate nor the trust have any obligation for Marian's support. "no obligation" to provide any funds of any kind for Marian's support.[6]

7. When their brother, Joel, testified at trial the Contesting Children took the position they had no obligation "of any kind" to Marian even if she were literally starving to death.[7]

SUMMARY OF ARGUMENT

At a hearing on February 10, 2000 trial judge had entered Findings of Fact on the record that Almon Flake would not have ever intend to leave his surviving spouse, Marian, destitute and on welfare because of his death. Decedent's estate arguably exceeded $800,000.00 just days before his death.

However, the trial judge believed himself bound by the law as argued by opposing legal counsel at trial and his conclusion expressed from the bench that the Trust provisions of the Utah Uniform Probate Code just were not part of the original

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[5] Record, Transcript of Proceedings, February 10, 2000, page 2, line 1.
[6] Record, Trial Transcript, pages 145-147. See also Appellant's Brief page 11.

legislative enactment. The judge commented that he had previously worked in the Office of Legislative Counsel and knew how such errors could happen. Consequently, the trial judge believed himself bound by law to rule in the Contesting Children's favor, leaving Marian destitute. The trial judge was in error as to the intent, purpose and meaning of the provisions of the Utah Uniform Probate Code and the public policy surrounding that enactment.

ARGUMENT

POINT 1

The trial Transcript reflects that the trial judge struggled with what he understood to be his obligation under law to enforce all settlement agreements.

As cited and quoted in the original Appellant Brief, the trial judge believed himself bound by the 1993 Court of Appeals case of **Goodmanson v. Liberty Bending**, 866 P.2d 581, 866 (Ct. App. 1993).

The impact and implications of the trial judge's conclusions as to his obligations under both Goodmanson and the Utah Uniform Probate Code must be appreciated. Judge Memmott's comments in the Transcript seemed almost agonizing, especially in light of his Findings that he made at the evidentiary Hearing on February 10, 2000.

In explaining how he felt bound law to rule against Marian's interest he commenced by reference to the holding of the Court of Appeals in **Goodmanson**. Judge Memmott commented:[8]

> Now, normally, as set forth in Goodmanson vs. Liberty Bending at 866 P.2d 581, there is a summary of the standard of review of a trial court and

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[7] See Appellant Brief, page 11, quoting Trial Transcript, pages 145-147.
[8] Record, Trial Transcript, September 27-29, pages 289-292.

> the ability of a trial court to enforce a settlement agreement and that it's not to be reversed except upon the finding of abuse of discretion and it goes through a litany of cases and explains that a court should enforce settlement agreements in lawsuits and it doesn't make any difference when that settlement agreement, whether it takes place out of presence of the court. It is the duty of the court to enforce settlement agreements and it specifically says in that case, it's of no legal consequence if the parties have not signed the settlement agreement. Likewise, if a written agreement is intended to memorialize an oral contract, the subsequent failure to execute the written document does not nullify the oral contract.

However, **Goodmanson** is distinguishable from the present case because there never was any signed agreement. In **Goodmanson** counsel for both parties had signed a written agreement. In the present case there was no evidence that there was ever any written document upon which the parties ever agreed.

POINT 2

The verbal Findings of Fact of the trial court given on the Record of Hearing dated February 10, 2000 are valid and are not inconsistent with final Conclusions of Law under which the trial judge believed himself to be bound.

This Supreme Court has previously held that it is not required that oral Findings of Fact must be reduced to writing to be valid. In the case of **Seal v. Mapleton City**, 598 P.2d 1346, 1348 (Utah 1979) this Court held that:

> Generally, where no request has been made for findings of fact, the presumption is that the trial court found all facts necessary to support its order and judgment.

That same conclusion was affirmed and followed by the Utah Supreme Court in the case of **Utah v. Ramirez**, 817 P.2d 774, 787 (Utah 1991):

> This court has held that in cases in which factual issues are presented to and must be resolved by the trial court but no findings of fact appear in the record, we "assume that the trier of facts found them in accord with its

decision, and we affirm the decision if from the evidence it would be reasonable to find facts to support it." n6

> n6 [*788] Mower v. McCarthy, 122 Utah 1, 6, 245 P.2d 224, 226 (1952); see also Seal v. Mapleton City, 598 P.2d 1346, 1348 (Utah 1979); Mojave Uranium Co. v. Mesa Petroleum Co., 22 Utah 2d 239, 244 n.7, 451 P.2d 587, 591 n.7 (1969). If the ambiguity of the facts makes this assumption unreasonable, however, we remand for a new trial. See Darger v. Nielsen, 605 P.2d 1223, 1225 n.2 (Utah 1979); Christensen v. Abbott, 595 P.2d 900, 903 (Utah 1979); Quagliana v. Exquisite Home Builders, Inc., 538 P.2d 301, 305 (Utah 1975); Thomas v. Farrell, 82 Utah 535, 542-43, 26 P.2d 328, 330-31 (1933). As the court of appeals recently noted in reviewing a search and seizure decision, "The issues presented in search and seizure cases are highly fact sensitive. ... Thus, detailed findings are necessary to enable this court to meaningfully review the issues on appeal." State v. Lovegren, 798 P.2d 767, 770 (Utah Ct. App. 1990) [**44] (citations omitted).

> This court in Acton v. Deliran, 737 P.2d 996 (Utah 1987), stated, "Failure of the trial court to make findings on all material issues is reversible error unless the facts in the record are 'clear, uncontroverted, and capable of supporting only a finding in favor of the judgment.'" Id. at 999 (quoting Kinkella v. Baugh, 660 P.2d 233, 236 (Utah 1983)). The court of appeals apparently relied on this statement of the standard in its recent decision in State v. Harrison, 805 P.2d 769, 152 Utah Adv. Rep. 19, 26 n.26 (Utah Ct. App. 1991). Acton's precise wording of the standard, however, is not entirely accurate. It is true that Kinkella v. Baugh, upon which the Action court relied, did find the trial court's failure to make findings harmless because the facts in the record were "clear, uncontroverted, and capable of supporting only a finding in favor of the judgment." Kinkella, 660 P.2d at 236. However, Kinkella did not say that in all other circumstances, a failure to make findings on all material issues is reversible error. Rather, it is only one ground for avoiding reversal for not making such findings. In finding the error harmless, the Kinkella court cited Corpus Juris Secundum, which lists the "clear and uncontroverted" standard as only one of several ways to avoid reversing a trial court that fails to make findings. See 5B C.J.S. Appeal and Error § 1790 (1958). Furthermore, this court has recognized many of the other ways C.J.S. lists as ways to avoid reversing such a trial court. See,

> e.g., Sorenson v. Beers, 614 P.2d 159, 160 (Utah 1980) (trial court upheld where requisite factual findings that were not made would only make explicit what was already implicit in other findings); Seal v. Mapleton City, 598 P.2d 1346, 1348 (Utah 1979) (presumption that trial court found facts necessary to support judgment); Farrell v. Turner, 25 Utah 2d 351, 355, 482 P.2d 117, 119 (1971) (even without requisite findings, trial court will be upheld if there is competent evidence to support ruling); Mojave Uranium Co. v. Mesa Petroleum Co., 22 Utah 2d 239, 244 n.7, 451 P.2d 587, 591 n.7 (1969) (presumption that findings, if made, would be in harmony with decision); Mower v. McCarthy, 122 Utah 1, 6, 245 P.2d 224, 226 (1952) (absent findings we affirm if it would be reasonable to find facts to support conclusion).
>
> In summary, the general rule is best and most inclusively stated as it was set forth in Mower: this court upholds the trial court even if it failed to make findings on the record whenever it would be reasonable to assume that the court actually made such findings. [Emphasis added]

On February 10, 2000 the trial court granted temporary support by entering a Finding of Fact that Almon J. Flake was not the kind of man who would have intentionally left Marian destitute upon his death.

From the date Almon died there is no evidence that the Contesting Children ever voluntarily permitted Marian to have one dime or gave her anything to sustain herself.

Even though the trial court felt bound by law to rule against Marian an order "consistent with the settlement agreement" was entered that the Contesting Children provide Marian $350.45 per month, nothing has been forthcoming. The actions of the Contesting Children in claiming their father wished to leave Marian destitute are, to say the least, disingenuous and exceptionally self-serving. In holding that position the Contesting Children have taken a posture of destitution for Marian, choosing instead to substantially benefit only themselves.

POINT 3

Espousing a position of leaving a surviving widow destitute is a violation of public policy set forth by the Utah Legislature through enactment of the Utah Uniform Probate Code. The Uniform Probate Code specifically encompassed administration of decedent's trusts within that policy.

In support of their position the Appellee/Cross-Appellants' Brief inappropriately cites two cases. **State v. Pena**, 869 P.2d 932 (Utah 1994), and **Estate of Grimm v. Roberts**, 784 P.2d 1238 (Utah Ct. App. 1989).

The **Pena** case is easily distinguishable. **State v. Pena** is a criminal case.

Citing **Pena**, attempting to circumvent the provisions of the Utah Probate Law, the Cross-Appellants argue dicta, claiming that the **Pena** case constitutes precedent that the trial court in the present matter properly held that an oral settlement agreement on matters of decedent's estates constitutes a waiver of all of rights. But the dicta of the **Pena** case doesn't even support that position.

In the present case there is no evidence that Marian ever agreed to anything. There is no evidence that Marian consented to anything. Nothing was ever concluded or signed.

Cross-Appellants also cite and quote **Estate of Grimm v. Roberts** as if that decision of the Court of Appeals was in their favor. It was not.

The facts in **Grimm v. Roberts**, at 1240, were that "after extensive and continuous negotiations" a written agreement was "executed" by the parties.

In **Grimm** there had been a written and signed "Family Settlement Agreement" ("FMA"). In addition the **Grimm** trial court also had entered three findings as to that agreement,

> By its judgment, the court ruled (1) the FAS was a valid and binding agreement; (2) that it was just and reasonable and, to the extent approval of the court was necesssary, it was approved by the court; (3) the estate was to be distributed in accordance with the FSA.

The **Grimm** case even goes further in than that in Marian's favor. **Grimm** dealt with interpretation and law that governed the decedent's Trust. Following the provisions of the Utah Uniform Probate Code the **Grimm** case included Trust Administration within and under all provisions of the Utah Uniform Probate Code and the public policy expressed therein. **Grimm** cited Part 11, of the Utah Uniform Probate Code, titled "Compromise of Controversies," specifically § 75-3-1101, et seq., that is titled, "Effect of Approval of Agreements Involving Trusts."

The expressed purpose of the Contesting Children has been to cut Marian off completely. Completing their design the Contesting Children left Marian without any support, arguably taking to themselves more than $800,000.00 in the process.

Immediately upon Almon's death the Contesting Children took over, instantly leaving Marian alone, impoverished and receiving welfare from her church. Then, many months later, on April 14, 1999, the Contesting Children came to the home and presented Marian with their demands.

They say that Marian "agreed" to her impoverishment and "waived" all objection to the contrary. But there is no evidence that Marian ever agreed to any such thing. The best claim the Contesting Children have against Marian is that she remained silent. Any agreement from a meeting between the parties on April 14, 1999 could only be

inferred. Even the letter sent weeks later from the Contesting Children's attorney, dated April 28, 1999 stated that "enclosed [is] a draft of the agreement."

This present case constitutes an open and uncompromising attempt to circumvent Utah Law and public policy. A current trend has made the word "trust" very marketable in estate planning of all kinds.

A trust "may" result in avoidance of probate of a decedent's estate but it may not be used as a means of avoiding several hundred years in the development of a civilized society leaning how to protect the poor and disadvantaged.

The very strong policy as to estates of decedents, expressed through the Utah Uniform Probate Code, does not permit any person to give away assets, resulting in the surviving spouse being left impoverished and on welfare.

It is recognized that many people now use trusts. That is a popular thing to do. That is why the Uniform Probate Code encompasses administration of all decedent estates, including "certain" trusts.

Why "certain" trusts?

Because inter-vivos trusts are now more widely used and sold as a means to less formal handling of decedent's estates. Because the word "trust" is so marketable and widely used that word now required six (6) pages for definition in Black's Law Dictionary, 6th Ed., 1991.

Some years ago counsel participated in a seminar at which one of the presenters said, "If you have a client who wants to trash his wife when he dies just remember that it can be done with a Trust in [a named East-coast state]. The presenter then

commented, "That might not be a nice thing to do but if that is what your client wants you need to know that it's possible — how and where."

There may be various states with various laws but such a thing certainly is not the law of the State of Utah and is not included in the common-law states. And any plan to "trash" a surviving spouse certainly is not intended in any of the community-property states.

Yet, that is exactly what the Contesting Children are trying to make out of the laws of the State of Utah. Some uncertainty as to the meaning of the word "trust" gives an opportunity for the Appellee/Cross-Appellants to circumvent and negate Utah Laws related to administration of decedents' estates. Appellee/Cross-Appellants have espoused their position before the trial court and now on appeal. Their position is that the provisions of the Utah Uniform Probate Code do not apply to trusts or any transfers made to themselves immediately before their father's death.

Appellee/Cross-Appellants attempted to use a "trust" to eliminate decedent laws that have been developed over a hundred years of social relations in this State. Utah law provides for protection of a surviving spouse, the widow, the poor and the disadvantaged.

Appellee/Cross-Appellants wish now to persuade this Court ignore that Utah Law governing decedents' estates includes not only "Trusts" but Elective Share and a number of options designed to protect the dependent spouse, children and the elderly. Ignoring the disadvantaged is not the law or the moral basis upon which the law rests in this State.

Quoting from the Editorial Board Comments published with the Utah Uniform Probate Code, Part 2, titled "Elective Share of Surviving Spouse,"

> The sections of this part describe a system for common-law states designed to protect a spouse of a decedent who was a domiciliary against donative transfers by will and will substitutes which would deprive the survivor of a "fair share" of the decedent's estate.
>
> * * *
>
> Some have questioned the need for any legislation checking the power of married persons to transfer their property as they please. ... Still, all common-law states except the Dakotas appear to impose some restriction on the power of a spouse to disinherit the other. ... In most states, including many which have abolished dower [i.e. Utah], a spouse's protection is found in statutes which give a surviving spouse the power to take a share of the decedent's probate estate upon election rejecting the provisions of the decedent's will. These [state] statutes expand the spouse's protection to all real and personal assets owned by the decedent at death, but usually take no account of various will substitutes which permit an owner to transfer ownership at his death without use of a will. [Emphasis added.]

The Uniform Probate Code, the Utah Legislature's enactment of the provision of that Uniform Code and this State's prior laws have firmly established the rights of a surviving spouse.

Section 75-1-102(2)(d) of the Utah Uniform Probate Code, titled "Purposes, Rule of Construction," contains provisions that include "certain trusts." In other words, the provisions and purposes of the Utah Uniform Probate Code establish law and public policy governing distribution of decedent's estates, including common trust documents that are widely used to transfer decedent's estates today.

That is why this matter is before this Court on appeal today. This matter is before this Court today because the trial court held that the surviving spouse

provisions and protections within the Utah Uniform Probate Code do not apply to trusts. That is reversible error.

Marian has critical needs. At the Evidentiary Hearing on February 10, 2000, the trial court awarded Marian a minimum temporary required support of an additional $1,000.00 from the decedent's estate to meet her minimum needs pending final trial and determination of all issues.

The Utah Uniform Probate Code must be read as a whole. It must not be permitted to be taken apart by the self-serving to circumvent the clear intent and purpose of laws of this State designed to protect persons who are left with no means to protect themselves.

Even if Almon J. Flake was the kind of man who wanted to trash his surviving spouse, which the trial court found that he was not, Utah Law does not permit that amoral kind of action by the decedent or his or her surviving children.

CONCLUSION

As required under § 75-3-912, any agreement between private parties dealing with distribution of decedent estates must be set forth in a "written contract executed by all who are affected by its provisions."

There is no legal merit to the Appellee/Cross-Appellants' position otherwise. Therefore, Appellant prays that decision of the trial court be reversed, the matter remanded, directing the relief prayed for in the Appellant Brief, that this Court consider both fees and costs of appeal and direct the trial court to enter judgment in accord therewith.

DATED: this 6 day of February 1999.

Loren D. Martin
Counsel for Appellant

PROOF OF SERVICE

I hereby certify that the foregoing,

APPELLANT'S ANSWER TO ISSUES RAISED IN CROSS-APPEAL
and
REPLY TO APPELLEE'S RESPONSE TO ISSUES
RAISED IN APPELLANT'S OPENING BRIEF

was lodged and filed with the Supreme Court and placed in the US Mail, postage prepaid on the 6th day of February, 2002 to the following:

Matthew C. Barneck
PO Box 2465
Salt Lake City, Utah 84110-2465

Shauna Beatty

INDEX TO ADDENDUM

Estate of Almon J. Flake
Case No. 20010478

ADDENDUM

Connie Flake Jackson, pro se
193 West 1250 North
Centerville, Utah 84014
Telephone: (801) 298-8230

IN THE SECOND JUDICIAL DISTRICT COURT
IN AND FOR DAVIS COUNTY, STATE OF UTAH

----- ooo0ooo -----

In the Matter of the Estate of:	) ( )	**MOTION TO QUASH SUBPOENA & MOTION FOR PROTECTIVE ORDER**
ALMON J. FLAKE,	( )	Probate No: 993700264
Deceased.	( )	Judge Jon M. Memmott

Comes now Connie Flake Jackson, pro se, and hereby moves this court to quash and for a Protective Order as it pertains to Petitioner Marion Flake's subpoena upon Connie Flake Jackson. The Petitioner has intentionally violated, disregarded, or otherwise failed to comply with Rule 45 of the Utah Rules of Civil Procedure. Particularly, no fee was attached with said subpoenas.

DATED this 18th day of February, 2000.

Connie Jackson

CONNIE FLAKE JACKSON, pro se

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing **MOTION TO QUASH SUBPOENA & MOTION FOR PROTECTIVE ORDER,** via U.S. Mail, postage prepaid, to:

Loren D. Martin
MARTIN & NELSON
P.O. Box 11590
Salt Lake City, Utah 84111

D. Bruce Oliver
D. BRUCE OLIVER, P.C.
180 South 300 West, Suite 210
Salt Lake City, Utah 84101

Dated this 18th day of February, 2000.

Connie Jackson

D. Bruce Oliver #5120
Attorney for Respondent Joel Flake
180 South 300 West, Suite 210
Salt Lake City, Utah 84101-1490
Telephone: (801) 328-8888
Fax: (801) 595-0300

IN THE SECOND JUDICIAL DISTRICT COURT
IN AND FOR DAVIS COUNTY, STATE OF UTAH

----- oooOooo -----

In the Matter of the Estate of:	)	**MEMORANDUM IN SUPPORT OF MOTIONS RE: SUBPOENAS**
ALMON J. FLAKE,	)	Probate No: 993700264
Deceased.	)	Judge Jon M. Memmott

Comes now Respondent, Joel Flake, by and through counsel, D. Bruce Oliver, and hereby submits this memorandum in support of his Motion to Quash and Motion for Protective Order.

STATEMENT OF FACTS

Previously, the Petitioner had served subpoenas upon multiple parties without copies being provided to Respondent's counsel as required by Rule 5(a) of the Utah Rules of Civil Procedure including the Respondent Joel Flake's counsel, D. Bruce Oliver. Since that date, Petitioner has apparently re-served all the same parties with new subpoenas. All of the parties have sought to quash said subpoenas, including this Respondent due to substantial violations of Rule 45 of the Utah Rules of Civil Procedure.

addendum

In this matter, the Petitioner has not provided any of the served witnesses with witness fees, or make arrangements for copy expenses. Moreover, it appears that said subpoenas were served by a party to the action. The Petitioner's counsel had each of the subpoenas served by an employee of Martin & Nelson, P.C. (The Petitioner's attorneys).

ARGUMENT
POINT I.
THE SUBPOENA SHOULD BE QUASHED AND RESPONDENT IS ENTITLED TO A PROTECTIVE ORDER.

Contrary to Rule 34 of the Utah Rules of Civil Procedure, under the power or abuse of the subpoena, the Petitioner can complete delivery of voluminous documents in the Respondent's possession, whether relevant or not to the matter at hand. Rule 34, the usual means of production of documents, the Respondent may merely make said records available for inspection and copying by Petitioner's counsel.

Utah Code Ann. Section 21-5-4 (1953, as amended) requires the Petitioner to bear the expenses of a witness, including fees and mileage. Additionally, Section 21-5-8 identifies that fees and compensation in all civil causes shall be paid by the party who causes the witnesses to attend. In this matter, the Petitioner has caused all of the parties to attend and delivery documents, many of which would be redundantly delivered due to their the subpoenas broadly general language and service upon multiple parties.

Rule 4(d) of the Utah Rules of Civil Procedure limits who may effect service on an individual. The subsection reads, "[Pleadings] may be served in this state or any other state or territory of the United States, by the sheriff or constable, or by the deputy of either, by a United States Marshall or by the marshall's deputy, or by any other person 18 years of age or

addendum

older at the time of service, **and not a party to the action or a party's attorney."**[1]

In this matter, the Petitioner's attorney had all the individuals served, served by "Emily Jayne Kunz" and agent and employee of the Petitioner's attorneys firm. Such service is impermissible under the rules as Ms. Kunz is an agent of the firm Martin and Nelson, P.C. (The Petitioner's attorneys).

CONCLUSION

Based upon the foregoing, D. Bruce Oliver, counsel of record, hereby requests a motion to quash the subpoena and for a Protective Order. Counsel should not have to testify nor produce documents protected under the attorney client privilege and the work product doctrine.

DATED this 18th day of February, 2000.

D. BRUCE OLIVER
Attorney for Respondent Joel Flake

[1] Substitution of "pleading" for the words "The summons and complaint" is permitted by Rule 5(a) of the Utah Rules of Civil Procedure by reference.

Addendum

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing **MEMORANDUM IN SUPPORT OF MOTIONS RE: SUBPOENAS,** via U.S. Mail, postage prepaid, to: Loren D. Martin, MARTIN & NELSON, P.O. Box 11590, Salt Lake City, Utah.

Dated this 21st day of February, 2000.

Jason K Jensen

addendum

V

Lynette Flake Watts, pro se
984 North 500 East
Centerville, Utah 84014
Telephone: (801) 295-8071

IN THE SECOND JUDICIAL DISTRICT COURT
IN AND FOR DAVIS COUNTY, STATE OF UTAH

----- ooo0ooo -----

In the Matter of the Estate of:	) ( )	**MOTION TO QUASH SUBPOENA & MOTION FOR PROTECTIVE ORDER**
ALMON J. FLAKE,	( )	Probate No: 993700264
Deceased.	( )	Judge Jon M. Memmott

Comes now Lynette Flake Watts, pro se, and hereby moves this court to quash and for a Protective Order as it pertains to Petitioner Marion Flake's subpoena upon Lynette Flake Watts. The Petitioner has intentionally violated, disregarded, or otherwise failed to comply with Rule 45 of the Utah Rules of Civil Procedure. Particularly, no fee was attached with said subpoenas.

DATED this 18th day of February, 2000.

Lynette Flake Watts

LYNETTE FLAKE WATTS, pro se

addendum

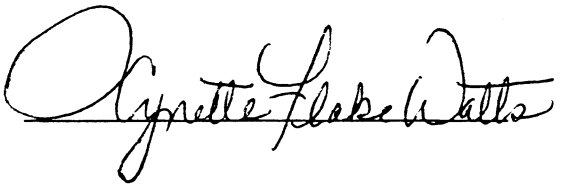
CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing **MOTION TO QUASH SUBPOENA & MOTION FOR PROTECTIVE ORDER,** via U.S. Mail, postage prepaid, to:

Loren D. Martin
MARTIN & NELSON
P.O. Box 11590
Salt Lake City, Utah 84111

D. Bruce Oliver
D. BRUCE OLIVER, P.C.
180 South 300 West, Suite 210
Salt Lake City, Utah 84101

Dated this 18th day of February, 2000.



addendum

Mark Widdison Flake, pro se
943 West 150 South
Kaysville, Utah 84037
Telephone: (801) 544-7615

IN THE SECOND JUDICIAL DISTRICT COURT
IN AND FOR DAVIS COUNTY, STATE OF UTAH

----- ooo0ooo -----

In the Matter of the Estate of:	)	**MOTION TO QUASH SUBPOENA & MOTION FOR PROTECTIVE ORDER**
ALMON J. FLAKE,	)	Probate No: 993700264
Deceased.	)	Judge Jon M. Memmott

Comes now Mark Widdison Flake, pro se, and hereby moves this court to quash and for a Protective Order as it pertains to Petitioner Marion Flake's subpoena upon Mark Widdison Flake. The Petitioner has intentionally violated, disregarded, or otherwise failed to comply with Rule 45 of the Utah Rules of Civil Procedure. Particularly, no fee was attached with said subpoenas.

DATED this 18th day of February, 2000.

MARK WIDDISON FLAKE, pro se

addendum

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing **MOTION TO QUASH SUBPOENA & MOTION FOR PROTECTIVE ORDER,** via U.S. Mail, postage prepaid, to:

Loren D. Martin
MARTIN & NELSON
P.O. Box 11590
Salt Lake City, Utah 84111

D. Bruce Oliver
D. BRUCE OLIVER, P.C.
180 South 300 West, Suite 210
Salt Lake City, Utah 84101

Dated this 18th day of February, 2000.

addendum

MARTIN & NELSON, PC
Loren D. Martin (2101)
139 East on South Temple, Suite 400
Salt Lake City, Utah 84111
Telephone: (801) 538-0066; Facsimile: (801) 538-0073

IN THE SECOND JUDICIAL DISTRICT COURT
DAVIS COUNTY, STATE OF UTAH
800 W. State Street, PO Box 769, Farmington, Utah 84025

In the Matter of the Estate of	:	ORDER
	:	Re: Granting Marian Flake's Motion
ALMON J. FLAKE,	:	
	:	
Deceased.	:	Case No. 99-370-0264
	:	Judge: Jon M. Memmott
	:	

This matter came before the Court on Notice to Submit for Decision on October 24, 2001. The Court, being fully advised in the matter and good cause appearing therefore, Marian Flake's MOTION FOR RELIEF FROM ORDER GRANTING TRUSTEE'S STAY, Dated August 29, 2001 is hereby Granted.

DATED: ~~October~~ Nov 23, 2001.

BY THE COURT:

/s/ Jon M. Memmott
JON H. MEMMOTT
District Judge

addendum

$913. And so the difference between the 913 and the 1200 is (inaudible).

THE COURT: The Court's going to make the following findings. And these cases that -- and I've had several -- are very difficult for families and the parties involved, you know. And I didn't have an opportunity to know Mr. Flake, but it appeared from everything that I have read, that he was a very caring, generous, good man, you know. And in that regard, probably (inaudible) to see what's transpired. Because I don't think he would be a very happy person if he came and saw what transpired. I don't think that would be his intent, in fact, in any of these documents to see what's happened over the last few days -- or the last several months or almost a year. I think he would have resolved it somewhat differently having seen what has taken place and given the history of what I've seen and read about this man.

The legal issues that I have to deal with is what document is controlling. And while I haven't reached that determination, I think that there is a substantial question as to whether the first trust, the second trust, if there is a trust, and what document controls. There is different languages, which we initially provided.

Initially, he provided for the care -- required the trust to care for the needs, including her living arrangements in the home or other reasonable living quarters.

The second trust there was no mention that the trust shall care for the needs, but it limited the payment of the second trust of how the home should be handled, and required that it be placed in a second trust, and that while it's in the second trust, that the trust shall pay for only certain costs and that other costs allowed the trustee to pay for such maintenance costs that the trustee should feel what is appropriate.

For purposes of temporary support, I'm trying to determine, then, what are her reasonable needs. And I think that's more than minimum needs. I think it's what are her reasonable needs. I think it should exclude things that are not reasonable because of how this may end.

So the Court is going to make the following determination: As to the medical expenses, that there's no question she has substantial medical needs, including issues with hearing aids, dental work, and medical. So I'm going to attribute $575 a month to her medical needs. And that includes certain testimony that I received in chambers as to her dental needs and bills that were presented to the Court as to what it's going to take to do her dental needs, plus her hearing aids.

Insurance, the Court is going to attribute $156. $146 to Blue Cross, plus $10 co-pay. Her car, $200, at $70 insurance. I think there is gas and upkeep. And I think

that at least she has had to make transportation for treatment, going to the hospital, and so it would necessitate regular use of the automobile.

The phone, a reasonable use, the Court's going to attribute $100. For food, $300. Her home maintenance will be taken care of. The Court's going to reduce that from $500 to $75. Recreation, from $150 to $75. I don't think there was shown recreation in terms of $150. Clothes and personal items, I think she does have some personal needs. The Court's going to reduce that from 300 to $100.

The miscellaneous, I think there are certain miscellaneous items, although during this time the trust is probably not responsible for gifts and those things, and the Court is going to reduce that to $100.

Also, the Court is going to allow tithing as a reasonable expense, because I think when there are (inaudible) Mr. Flake through his life has paid that, I'm going to make that determination and is going to do that.

Those items added together would be $1,772.30. If I take the $913, that leaves a balance of $859.30. The Court -- I believe that there has been, because of the pendency and the time, that there has been some back (inaudible). So the Court is going to -- feels that there are some expenses that have accrued, because she's had to charge items and hasn't had funds available. So the Court is

going to order that the trust pay her living expenses, plus $1,000 on a temporary basis until there's a final resolution and interpretation of that agreement.

Are there any questions about --

MR. MARTIN: Just a question, Your Honor. We have a difference of 859.30, which was calculated as reasonable living expenses, another $1,000 per month as to the back -- the costs that have been accrued, is that what you mean?

THE COURT: No, the $1,000 a month -- beginning in the month of February, the trust will pay $1,000, plus the cost of the home, including the (inaudible). I'm not going to make it retroactive. I think she's incurred some expenses. There's some expenses she hasn't had, but there's some she's had to charge and everything else because she hasn't had adequate funds. So that's why the Court is -- there's approximately $140 a month difference that the Court is awarding between what I have as reasonable necessary expenses and what I'm awarding.

MR. MARTIN: The final order, then, is that we have $1,000 a month the trust will pay to her --

THE COURT: Yes.

MR. MARTIN: -- beginning in February?

THE COURT: Beginning in February, yes. It will be paid by the end of February and the last day of each month. And that is just on a temporary basis. This is not a

permanent award. And I would be glad as soon as the parties want to schedule this, so there can be a final disposition. In a final disposition, all of this could change. This is just a temporary award. And so I would be glad to schedule as soon as the parties are ready to have a full hearing or trial in this matter.

MR. OLIVER: Thank you, Your Honor.

MR. MARTIN: Thank you, Your Honor.

THE COURT: Mr. Martin, you'll prepare the order?

MR. MARTIN: Yes, sir.

THE COURT: Thank you.

(Thereupon, the hearing was concluded.)

addendum

Carver & West, L.L.C.

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Westgate Business Center
30 South 300 West, Suite 218
Salt Lake City, Utah 84101
Telephone: (801) 364-3130

Attorneys and Counselors at Law
DAVID RAY CARVER
ORSON B. WEST

Kaysville Office
Corners Professional Bldg.
93 South Main, Suite 2
Kaysville, Utah 84037
Telephone: (801) 547-9262

April 28, 1999

Mr. David J. Crapo
Wood Crapo L.L.C.
500 Eagle Gate Tower
60 East South Temple
Salt Lake City, Utah 84111

Re: The Almon J. Flake Family Trust
Your client: Marian R. Flake

Dear Mr. Crapo:

I have enclosed a draft of the agreement made by the parties on April 14. Please review the agreement with your client and then let me know if there are any clarifications or modifications that you feel would be appropriate.

The Trustee has made the following payments, per the agreement made April 14:

Davis Schools Credit Union	$1,981.97 balance paid 4-15-99
ZCMI	$1,272.96 balance paid 4-16-99
Mervyn's	$ 324.37 valance paid 4-16-99

The Target account, in the amount of $682.31, will be paid as soon as you notify me what the account number is. Target would not release any information to the Trustee.

CUNA Mutual released the following information to the Trustee:

Policy No. 000425975 (monthly premium of $72.54) was surrendered for the cash value by Marian in November, 1998. I am very disappointed in her representations regarding this policy.

Policy No. JV3013314 ($10,000 face amount, $67.54 monthly premium) is current. CUNA is sending the ownership change papers to Marian. Please have her transfer ownership to the trust as soon as possible.

The Forethought Burial Plan is in the process of changing the ownership to the trust.

addendum

Please let me know the Target account number as soon as possible. Also, please let me know what progress has been made regarding the NuSkin stock or what information you have obtained.

Thank you for your cooperation in this matter.

Very truly yours,

David Ray Carver

cc: Joel A. Flake, Trustee

addendum

GX

SETTLEMENT AGREEMENT

The following parties agree to this settlement agreement as resolving all of the below issues and all claims that Marian R. Flake may have against the estate of Almon J. Flake or The Almon J. Flake Family Trust dated September 22, 1987 (hereinafter the "Trust").

1. Marian R. Flake is the surviving spouse of Almon J. Flake. She resides at 604 East 540 North, Centerville, Utah 84014.

2. Joel A. Flake is the current Trustee of The Almon J. Flake Family Trust. All information concerning the Trust should be sent to him at 1913 West 500 North, Provo, Utah 84601.

3. On April 14, 1999, Marian R. Flake and her attorney, David J. Crapo, meet with Joel A. Flake (the Trustee) and David Ray Carver (the attorney for the Trustee) along with three of the other children of Almon J. Flake. The only child not present was Vicki Lynn Flake.

4. The Trust has already distributed the Cadillac to Marian R. Flake pursuant to Article IX paragraph C of the Trust.

5. The Trust shall manage the home as provided in Article IX paragraph D of the Trust wherein it states the following:

   D. Marian R. Flake. If Marian R. Flake survives me, the main part of my home (located at 604 East 540 North in Centerville) shall be held in a separate trust as a life estate for her benefit. The Trust shall pay the following costs associated with the property: property insurance, property taxes, electricity, heating fuel, water, and other city utilities. Marian R. Flake shall pay all other costs associated with the property including telephone charges and maintenance and upkeep costs. However, the Trustee shall have discretion to pay such part or all of the maintenance costs of the home that the Trustee feels is appropriate.

   1. The Trustee may rent out the basement apartment to generate funds to take care of the costs of the home. The Trustee may also use such other funds in the Trust as may be necessary to take care of the costs of the home.

   2. This life estate will terminate at the earlier of the death of Marian R. Flake, her moving from the home, her remarriage or cohabitation, or her prior failure to pay her share of the costs associated with the property.

   3. At the termination of this life estate this trust shall be distributed as provided in paragraph E below.

6. The Trust agreed to pay the following debts in the approximate amount as follows:

Davis Schools Credit Union	$2,100.00	($1,981.97 balance paid 4-15-99)
ZCMI	$1,371.23	($1,272.96 balance paid 4-16-99)
Mervyn's	$ 168.49	($324.37 balance paid 4-16-99)
Target	$ 682.31	To be paid when Marion informs Trustee of account number.

Addendum
D. 19

EK

7. Marian R. Flake agreed to immediately close all of the accounts listed in paragraph 6

8. Marian R. Flake will file a joint tax return for the tax years 1998 and 1999. Any savings resulting by filing the joint tax return will be retained by the Trust.

9. Marian R. Flake will assign ownership of the funeral plan to the Trust. The Trust will maintain a funeral plan to take care of her reasonable funeral expenses.

10. Marian R. Flake will assign to the Trust ownership of CUNA Mutual Life Insurance Policy No. JV3013314. The Trust may pay the premiums and receive the proceeds to reimburse the trust for some of the expenses the Trust paid on her behalf.

11. The electricity to the barn shall be disconnected. Marian R. Flake may keep storage items in the upper part of the barn but she does so at her own risk due to the condition of the barn. The Trust may keep items in the bottom part of the barn at its own risk.

12. In an effort to avoid needless confusion after the death of Marian R. Flake, she will make a list of personal property items that will disclose who she feels owns the listed personal property items. The Trustee (representing the children of Almon J. Flake) will have the opportunity to make any additions to the list and to state any reason that they believe the ownership of the item should be different that as stated. The list of personal property items will disclose the following:
(1) her separate property,
(2) the separate property of Almon J. Flake, and
(3) the joint property of Marian R. Flake and Almon J. Flake (which will be divided equally by their two families after Marian dies).

13. If Marian R. Flake discovers any additional records of Almon J. Flake she shall release the records to the Trustee.

14. In consideration for the above payments made by the Trust, Marian R. Flake hereby releases any other claim she may have been able to make against the estate of Almon J. Flake or The Almon J. Flake Family Trust dated September 22, 1987 including any rights that she might have had under the provisions of the Utah Uniform Probate Code.

DATED this ____ day of May 1999.

Marian R. Flake

Joel A. Flake, Trustee

addendum

EK

State of _____)
:ss.
County of _____)

The foregoing instrument was acknowledged before me this ____ day of May 1999 by Marian R. Flake.

_____
Notary Public
Residing at:
My Commission Expires:

State of _____)
:ss.
County of _____)

The foregoing instrument was acknowledged before me this ____ day of May 1999 by Joel A. Flake, Trustee.

_____
Notary Public
Residing at:
My Commission Expires:

Addendum
Page 21

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Carver & West, L.L.C.

Attorneys and Counselors at Law
DAVID RAY CARVER
ORSON B. WEST

Salt Lake City Office
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Telephone: (801) 364-3130

Kaysville Office
Corners Professional Bldg
93 South Main, Suite 2
Kaysville, Utah 84037
Telephone (801) 547-9262

October 1, 1999

Mr Loren D Martin
Martin & Nelson
139 East on South Temple, Suite 400
P.O Box 11590
Salt Lake City, Utah 84147-0590

Re: The Almon J. Flake Family Trust
Your client: Marian R. Flake

Dear Mr. Martin:

I have enclosed a copy of the Settlement Agreement that your client agreed to. Although your client never signed the agreement, my client paid the debts your client requested be paid immediately to protect her from creditor problems. Therefore, I expect your client to fulfill her part of the agreement.

I am not sure what questions your client has but I recommend that you instruct her to follow the terms of the agreement and to not dispose of any personal property that belongs to Almon. I have also enclosed a copy of the letter I mailed to your client before you notified me that you were representing her.

Very truly yours,

David Ray Carver

cc: Joel A. Flake, Trustee

addendum
Page 25

PLAINTIFF'S EXHIBIT
EXHIBIT NO. 2
CASE NO. 99-37-0026
DATE REC'D IN EVIDENCE
CLERK

SETTLEMENT AGREEMENT

The following parties agree to this settlement agreement as resolving all of the below issues and all claims that Marian R. Flake may have against the estate of Almon J Flake or The Almon J Flake Family Trust dated September 22, 1987 (hereinafter the "Trust")

1 Marian R. Flake is the surviving spouse of Almon J Flake She resides at 604 East 540 North, Centerville, Utah 84014

2. Joel A. Flake is the current Trustee of The Almon J Flake Family Trust All information concerning the Trust should be sent to him at 1913 West 500 North, Provo, Utah 84601

3 On April 14, 1999, Marian R. Flake and her attorney, David J Crapo, meet with Joel A. Flake (the Trustee) and David Ray Carver (the attorney for the Trustee) along with three of the other children of Almon J. Flake The only child not present was Vicki Lynn Flake.

4. The Trust has already distributed the Cadillac to Marian R. Flake pursuant to Article IX paragraph C of the Trust.

5. The Trust shall manage the home as provided in Article IX paragraph D of the Trust wherein it states the following:

D. Marian R. Flake. If Marian R. Flake survives me, the main part of my home (located at 604 East 540 North in Centerville) shall be held in a separate trust as a life estate for her benefit. The Trust shall pay the following costs associated with the property: property insurance, property taxes, electricity, heating fuel, water, and other city utilities. Marian R. Flake shall pay all other costs associated with the property including telephone charges and maintenance and upkeep costs. However, the Trustee shall have discretion to pay such part or all of the maintenance costs of the home that the Trustee feels is appropriate.

1. The Trustee may rent out the basement apartment to generate funds to take care of the costs of the home. The Trustee may also use such other funds in the Trust as may be necessary to take care of the costs of the home.

2. This life estate will terminate at the earlier of the death of Marian R. Flake, her moving from the home, her remarriage or cohabitation, or her prior failure to pay her share of the costs associated with the property.

3. At the termination of this life estate this trust shall be distributed as provided in paragraph E below.

6. The Trust agreed to pay the following debts in the approximate amount as follows:

Davis Schools Credit Union	$2,100.00	($1,981.97 balance paid 4-15-99)
ZCMI	$1,371.23	($1,272.96 balance paid 4-16-99)
Mervyn's	$ 168 49	($324.37 balance paid 4-16-99)
Target	$ 682.31	To be paid when Marion informs Trustee of account number.

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7 Marian R Flake agreed to immediately close all of the accounts listed in paragraph 6

8 Marian R Flake will file a joint tax return for the tax years 1998 and 1999 Any savings resulting by filing the joint tax return will be retained by the Trust

9 Marian R Flake will assign ownership of the funeral plan to the Trust The Trust will maintain a funeral plan to take care of her reasonable funeral expenses

10 Marian R Flake will assign to the Trust ownership of CUNA Mutual Life Insurance Policy No JV3013314 The Trust may pay the premiums and receive the proceeds to reimburse the trust for some of the expenses the Trust paid on her behalf

11 The electricity to the barn shall be disconnected Marian R Flake may keep storage items in the upper part of the barn but she does so at her own risk due to the condition of the barn The Trust may keep items in the bottom part of the barn at its own risk

12 In an effort to avoid needless confusion after the death of Marian R Flake, she will make a list of personal property items that will disclose who she feels owns the listed personal property items The Trustee (representing the children of Almon J Flake) will have the opportunity to make any additions to the list and to state any reason that they believe the ownership of the item should be different that as stated The list of personal property items will disclose the following
(1) her separate property,
(2) the separate property of Almon J Flake, and
(3) the joint property of Marian R Flake and Almon J Flake (which will be divided equally by their two families after Marian dies)

13 If Marian R Flake discovers any additional records of Almon J Flake she shall release the records to the Trustee

14 In consideration for the above payments made by the Trust, Marian R Flake hereby releases any other claim she may have been able to make against the estate of Almon J Flake or The Almon J Flake Family Trust dated September 22, 1987 including any rights that she might have had under the provisions of the Utah Uniform Probate Code

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